Supreme Court, U.S.
FILED
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(2)

No. 01-190

In the Supreme Court of the United States

ROBERT B. OGREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the offense of threatening the President, in violation of 18 U.S.C. 871, requires proof that the defendant intended to carry out the threat.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Herman v. *United States*, 498 U.S. 944 (1990)	15
Liparota v. *United States*, 471 U.S. 419 (1985)	8
Ragansky v. *United States*, 253 F. 643 (7th Cir. 1918)	7-8
Rogers v. *United States*, 422 U.S. 35 (1975)	9, 10
Roy v. *United States*, 416 F.2d 874 (9th Cir. 1969)	10, 11, 12, 13
Smith v. *United States*, 502 U.S. 852 (1991)	15
Staples v. *United States*, 511 U.S. 600 (1994)	8
United States v. *Callahan*:	
702 F.2d 964 (11th Cir.), cert. denied, 464 U.S. 840 (1983)	11
464 U.S. 840 (1983)	15
United States v. *Frederickson*, 601 F.2d 1358 (8th Cir.), cert. denied, 444 U.S. 934 (1979)	11
United States v. *Fulmer*, 108 F.3d 1486 (1st Cir. 199)	11
United States v. *Hoffman*, 806 F.2d 703 (7th Cir. 1986), cert. denied, 481 U.S. 1005 (1987)	8, 11
United States v. *Howell*, 719 F.2d 1258 (5th Cir. 1983), cert. denied, 467 U.S. 1228 (1984)	11
United States v. *Johnson*:	
14 F.3d 766 (2d Cir.), cert. denied, 512 U.S. 1240 (1994)	11
512 U.S. 1240 (1994)	15

Cases—Continued: Page

United States v. *Kosma*, 951 F.2d 549 (3d Cir. 1991) 10, 11
United States v. *Manning*:
923 F.2d 83 (8th Cir.), cert. denied, 501 U.S. 1234 (1991) 11
501 U.S. 1234 (1991) 15
United States v. *Miller*, 115 F.3d 361 (6th Cir.), cert. denied, 522 U.S. 883 (1997) 11
United States v. *Patillo*;
431 F.2d 293 (1970), vacated on reh'g, 438 F.2d 13 (4th Cir. 1971) 12
438 F.2d 13 (4th Cir. 1971) 12, 13, 14
United States v. *Weaver*, No. 96-4708, 1997 WL 787132 (4th Cir. Dec. 24, 1997) 14
United States v. *Welch*, 745 F.2d 614 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985) 11
Watts v. *United States*:
402 F.2d 676 (D.C. Cir. 1968), rev'd on other grounds, 394 U.S. 705 (1969) 11
394 U.S. 705 (1969) 9-10

Statutes:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 91, 10 U.S.C. 891 2
Art. 108, 10 U.S.C. 908 2
Art. 128, 10 U.S.C. 928 2
Art. 134, 10 U.S.C. 934 ..... 2, 4
7 U.S.C. 2024(b)(1) 8
18 U.S.C. 871 ..... *passim*
18 U.S.C. 871(a) 4
26 U.S.C. 5861(d) 8

Miscellaneous:

53 Cong. Rec. 9378 (1916) 9
Manual for Courts-Marital United States (2000 ed.) 4

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-17a) is reported at 54 M.J. 481. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 18a-41a) is reported at 52 M.J. 528.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 2, 2001. The petition for a writ of certiorari was filed on July 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by a general court-martial and, in accordance with pleas of guilty, petitioner was convicted of three specifications of disrespectful language and one specification of disobedience of a noncommissioned officer (NCO), in violation of Article 91 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 891; one specification of willfully damaging military property, in violation of UCMJ Article 108, 10 U.S.C. 908; and one specification of assault and battery, in violation of UCMJ Article 128, 10 U.S.C. 928. Contrary to his pleas, petitioner was also convicted by the military judge of a third specification of disrespect to an NCO, in violation of UCMJ Article 91, 10 U.S.C. 891; one specification of communicating a threat, in violation of UCMJ Article 134, 10 U.S.C. 934; and one specification of communicating a threat to harm the President, in violation of 18 U.S.C. 871, as assimilated by 10 U.S.C. 934. Petitioner was sentenced to a dishonorable discharge, confinement for 12 months, total forfeiture of pay, and reduction to the lowest enlisted grade; the general court-martial convening authority suspended all confinement in excess of 200 days. The Navy-Marine Corps Court of Criminal Appeals affirmed, Pet. App. 18a-41a, as did the United States Court of Appeals for the Armed Forces, *id.* at 1a-17a.

1. On June 25, 1998, while petitioner was in pretrial confinement awaiting trial by a general court-martial on unrelated charges, petitioner threatened to harm a brig guard and her children. The following day, when petitioner was asked by the guard to sign a statement acknowledging inappropriate behavior, he repeated his threats, flooded his cell, and violently resisted when guards threatened to subdue him. When petitioner was

confronted by another brig guard about abusive comments that he had made to another detainee, he replied, "Fuck off" and added, "Fuck the Admiral, and fuck the President." He then added, "As a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard." The guard construed the threat as one to kill the President and reported the matter to his leading chief petty officer. Pet. App. 3a, 20a-21a.

During the same morning, yet another brig guard inquired why petitioner was enraged and beating on the bulkheads of his cell. Petitioner responded, "I can't wait to get out of here man." When he was asked why, he added, "Because I'm going to find the President, and I'm going to shove a gun up his ass, and I'm going to blow his fucking brains out." The guard then asked what President petitioner was talking about; petitioner responded "Clinton, Clinton man! I'm going to find Clinton and blow his fucking brains out." The guard documented the incident, notified his superiors and telephoned the Secret Service, the agency within the federal government responsible for the protection of the President. Pet. App. 3a-4a, 21a-22a.

On July 22, 1998, Special Agent Douglas Cohen of the Secret Service interviewed petitioner, who admitted making the threatening statements concerning the President on the preceding day. When Agent Cohen asked petitioner whether he had any guns, petitioner responded, "No, but I can get them." Petitioner then inquired of Agent Cohen whether receipt of an other-than-honorable discharge would affect his ability to obtain weapons for hunting. He also told Cohen, however, that, when he made the threats, he "was blowing off steam and was expressing displeasure at his incarceration." In response to Agent Cohen's suggestion,

petitioner drafted a written apology to the President for making the threat. Pet. App. 22a.

2. Petitioner was subsequently charged with, *inter alia*, threatening the President, in violation of 18 U.S.C. 871, as assimilated by Article 134 of the UCMJ.[1] Section 871(a) provides in part as follows:

> Whoever knowingly and willfully * * * makes any * * * threat [to take the life of, to kidnap or to inflict bodily harm] against the President * * * shall be fined under this title or imprisoned not more than five years, or both.

During opening argument and in summation, petitioner's counsel argued that Section 871 was not intended by Congress to reach threats against the President made as part of an effort to antagonize corrections authorities; that no evidence existed that petitioner had taken any steps to effectuate his threat to kill the President; and that, under the totality of the circumstances, the threats could not be taken seriously. Tr. 50-51, 112-113. The prosecutor submitted a trial memorandum addressing the elements of a violation of that statute. It stressed that the fact-finder need only conclude that a reasonable person would foresee that the defendant's statements would be interpreted as a serious expression of intent to kill or inflict bodily harm

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[1] 10 U.S.C. 934 (Art. 134 UCMJ) provides in part: "Though not specifically mentioned in this chapter, all * * * crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court." Such crimes consist of noncapital offenses that violate federal law. See *Manual for Courts-Martial United States* ¶ 60.c, at IV-94 (2000 ed.).

upon the President, and that it was unnecessary to prove the defendant actually intended to carry out the threat. See Appellate Exh. IV. Before deliberating, the military judge stated that he would use the legal authorities that counsel for both sides had furnished him to explain the elements and the pertinent law concerning a violation of Section 871. Tr. 109. The judge subsequently returned a finding of guilty on the specification alleging a violation of that statute, without further particularizing the elements that he applied in his deliberations. Tr. 116-117.

3. On appeal before the Navy-Marine Court of Criminal Appeals (Navy Court), petitioner challenged the sufficiency of the evidence supporting his conviction for a violation of Section 871. Petitioner argued that the prosecution failed to establish that he had made a "true threat" against President Clinton, and that he had not acted willfully because he had not intended to inflict any harm against the President. See Pet. App. 23a-25a.

The Navy Court rejected those contentions and affirmed the conviction. The court concluded, with respect to the element of willfulness, that Section 871 "does not require that the defendant actually intend to carry out the threat," and that "the only requirement is that the accused intentionally and knowingly communicated his threat." Pet. App. 32a. As the court explained, "[i]f the speaker intended to make the statement, knew what the words meant, and reasonably should have foreseen that the statements he made would be understood as indicating a serious intention to commit the act, then this element [of willfulness] is satisfied." *Id.* at 32a-33a. The court further concluded that the evidence established beyond a reasonable doubt that petitioner "knowingly uttered the statement clearly understanding what his words meant," *id.* at

33a, and that a reasonable person would have foreseen that petitioner's statement would be construed as a serious threat against the President, *id.* at 34a.

4. The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-17a. Like the Navy Court, the court of appeals concluded that the element of willfulness under Section 871 is governed by an "objective" standard, which the court described as follows:

> The objective test requires only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President.

Id. at 9a (internal quotation marks omitted).

The court emphasized that Section 871 is intended not just to protect the President's life and physical safety, but also to protect against harms associated with the threat itself. Pet. App. 11a. "This harm may occur at the moment a threat issues, *e.g.*, with a change in schedule or the dispatch of investigators." *Ibid.* By contrast, the court concluded, a subjective standard, which would require proof of the declarant's actual intent to effectuate the threat, would impose too high a threshold to accomplish the purposes of Section 871, for "it might not deter a subjectively neutral declarant from * * * disrupting the President's activities." *Ibid.*

The court further concluded that a rational trier of fact could conclude that petitioner should reasonably have foreseen that his threats against President Clinton would be understood as true threats, and not as

merely "a crude method of responding to confinement." Pet. App. 12a-13a. In particular, the court noted that, at a minimum, petitioner's second threatening statement was made after a night in which petitioner had the opportunity to reflect on his actions, and yet petitioner did not disavow his threat of the previous day. Nor, the court noted, were petitioner's words "uttered in a political context, intertwined with the substance of political protest or criticism, or an effort at sharing ideas." *Id.* at 13a.

ARGUMENT

The court of appeals correctly concluded that the offense of threatening the President in violation of 18 U.S.C. 871 does not require the prosecution to prove that the defendant actually intended to carry out his threat. Further review is therefore not warranted.

1. Petitioner contends (Pet. 4-5) that, by adopting an objective standard for determining whether a threat made against the President in violation of 18 U.S.C. 871 was willful, the court below effectively eliminated the element of *mens rea* from the statute. That contention is without merit.

Even without a requirement that the government prove that the defendant actually intended to carry out his threat against the President, the statute still contains a significant scienter requirement. The courts, including those adopting the rule that proof of actual intent to effectuate a threat is unnecessary, have long held that, for a threatening statement to be knowingly made, "the maker of it [must] comprehend[] the meaning of the words uttered by him," and must "voluntarily and intentionally utter[] them as the declaration of an apparent determination to carry them into execution." *Ragansky* v. *United States*, 253 F. 643, 645 (7th Cir.

1918). The statute thus requires a defendant to understand the significance of the words comprising the threat. See *United States* v. *Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986) ("[T]o establish violation of sec. 871 the government must prove that the defendant understood the meaning of the words to be an apparent threat.") (internal quotation marks omitted), cert. denied, 481 U.S. 1005 (1987).

Petitioner therefore errs in relying (Pet. 4-5) on *Staples* v. *United States*, 511 U.S. 600 (1994), and *Liparota* v. *United States*, 471 U.S. 419 (1985), in contending that the "objective" test for willfulness strips Section 871 of a scienter element. In *Staples*, this Court construed 26 U.S.C. 5861(d) to require proof that the defendant knew the particular characteristics of a firearm that made it subject to regulation. 511 U.S. at 616-617. In *Liparota*, the Court construed 7 U.S.C. 2024(b)(1) to require proof that the defendant knew that he was acting in a manner not authorized by statutes or regulations governing the use of food stamps. 471 U.S. at 426-427. At most, those decisions indicate that a defendant must ordinarily understand the character of his actions to be found criminally liable. Neither decision is inconsistent with the lower courts' reading of Section 871. As the Navy Court explained, the statute requires proof that the defendant "intended to make the statement, [and] knew what the words meant." Pet. App. 32a.

The objective test adopted by the court of appeals is also fully consistent with Congress's intent in enacting Section 871, as demonstrated by statements of several sponsors of the legislation during floor debates. In the wake of a proposal to delete the word "willfully" from

the statute, Representative Volstead objected, and stated as follows:

> The word willfully adds an intention to threaten, and distinguishes a case [in which the defendant does not intend to convey any threat]. Without the requirement of willfulness, * * * a person might send innocently, without any intention to convey a threat at all, an instrument to a friend that contained a threat, and he would be guilty.

See *Rogers* v. *United States*, 422 U.S. 35, 45 (1975) (Marshall, J., concurring) (quoting 53 Cong. Rec. 9378 (1916) (statement of Rep. Volstead)) (internal quotation marks omitted). Representative Webb, who also opposed deletion of the term "willfully," added the following:

> I do not think we ought to be too anxious to convict a man who does a thing thoughtlessly. I think it ought to be a willful expression of an intent to carry out a threat against the Executive.

Rogers, 422 U.S. at 45-46 (Marshall, J., concurring) (quoting 53 Cong. Rec. at 9378 (statement of Rep. Webb)).

The objective test governing Section 871 comports with those expressions of the sponsors' intent. As Justice Marshall explained in his concurring opinion in *Rogers*, those statements suggest that the sponsors "intended the bill to require a showing that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one." 422 U.S. at 46. Because a defendant must be aware of the threatening character of his statements, and because those statements must be "true threats," see *Watts* v. *United*

States, 394 U.S. 705, 707-712 (1969) (per curiam), there is little danger that a defendant can be convicted if he merely acts "thoughtlessly" and without intending to convey a threat at all.

Justice Marshall expressly rejected, however, a construction of Section 871 that would require proof of an express intention to carry a threat into effect:

> A threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President. Because § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President.

Rogers, 422 U.S. at 47 (Marshall, J., concurring). See also *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969) (explaining that Section 871 was designed in light of the detrimental effect of a threat against the President whether or not the person actually intends to carry out the threat); *United States* v. *Kosma*, 951 F.2d 549, 556 (3d Cir. 1991) (same). The test adopted by the court of appeals serves Congress's objectives in Section 871 by deterring true threats that have the potential to disrupt the President's functions and restrict his movements.

2. Petitioner also argues (Pet. 5-6) that this Court should grant review to resolve a conflict among the circuits on whether Section 871 requires proof of the defendant's intent actually to carry out a threat. That purported conflict, however, does not warrant this Court's review.

As the court of appeals observed (Pet. App. 8a-9a), the majority of the courts of appeals have ruled that the "willfulness" element of Section 871 does not require proof that the defendant intended to carry out the threat, but only that he intentionally made a statement that a reasonable person would foresee being interpreted as a serious expression of an intention to kill or harm the President. See *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States* v. *Johnson*, 14 F.3d 766, 768-769 (2d Cir.), cert. denied, 512 U.S. 1240 (1994); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States* v. *Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (per curiam), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Miller*, 115 F.3d 361, 364 (6th Cir.), cert. denied, 522 U.S. 883 (1997); *United States* v. *Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986); *United States* v. *Manning*, 923 F.2d 83, 85-86 (8th Cir.), cert. denied, 501 U.S. 1234 (1991); *Roy* v. *United States*, 416 F.2d 874, 877 (9th Cir. 1969); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Callahan*, 702 F.2d 964, 965 (11th Cir.) (per curiam), cert. denied, 464 U.S. 840 (1983); *Watts* v. *United States*, 402 F.2d 676, 678-682 (D.C. Cir. 1968), rev'd on other grounds, 394 U.S. 705 (1969).[2]

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[2] *United States* v. *Frederickson*, 601 F.2d 1358, 1363 (8th Cir.), cert. denied, 444 U.S. 934 (1979), on which petitioner also relies (Pet. 6), is not contrary to the majority view. In that case, the district court's jury instructions adopted the construction of the willfulness requirement enunciated by Justice Marshall in his concurring opinion in *Rogers*. The court of appeals simply held that, as no objection was made to the instruction, "the *Rogers* view of the statute constitutes the law of this case, against which we measure the sufficiency of the evidence." As explained above (p. 10, *supra*), Justice Marshall's concurring opinion in *Rogers*

The opinion of a divided panel of the Fourth Circuit in *United States* v. *Patillo*, 431 F.2d 293 (1970), vacated on rehearing en banc, 438 F.2d 13 (1971), stands alone in ruling to the contrary. In that case, the panel apparently adopted a subjective test:

> The threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President. Such intent may take the form of a bad purpose to personally do harm to the President or to incite some other person to do the injury.

431 F.2d at 297-298 (footnote omitted). The panel majority reversed the defendant's conviction because the district court had only required proof that the defendant knowingly and voluntarily made statements as a declaration of an apparent determination to carry them out. *Id.* at 298.

The holding of the divided panel in *Patillo* does not, however, constitute an accurate reflection of the views of the Fourth Circuit with respect to the element of willfulness under 18 U.S.C. 871. After granting the government's petition for rehearing in that case, the en banc court modified the panel's purely subjective test requiring an intent to injure the President. *United States* v. *Patillo*, 438 F.2d 13 (4th Cir. 1971) (en banc). Relying on the Ninth Circuit's decision in *Roy*, *supra*, the en banc court observed that, "even though the maker of the threat does not have an actual intention to assault the President, an apparently serious threat may cause mischief or evil toward which [Section 871] was in

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expressly rejected a construction of Section 871 that would require proof of an actual subjective intent to effectuate a threat against the President.

part directed," and that, accordingly, "[t]he statute does not require that the defendant actually intend to carry out the threat." *Patillo*, 438 F.2d at 15 (quoting *Roy*, 416 F.2d at 877-878). The en banc court then expressed agreement with the reasoning of other courts of appeals that the statute "was designed to prevent a secondary evil other than actual assaults upon the President or incitement to assault the President," and that "it is a legitimate area of congressional concern to prevent and make criminal disruption of presidential activity and movement that may result simply from publication of an apparent threat upon the President's life." The court stated that, "[w]hen a threat is published with an intent to disrupt presidential activity, we think there is sufficient mens rea under the secondary sanction of the statute." *Id.* at 15-16.

Purporting to clarify an "apparent misunderstanding of [its] prior panel decision," the en banc court further stated that "an essential element of guilt [of Section 871] is a present intention either to injure the President, or incite others to injure him, *or to restrict his movements.*" *Patillo*, 438 F.2d at 16 (emphasis added). The court also explained that the "latter intention [could be established] from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President." *Ibid.*[3]

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[3] Like the panel, however, the en banc court reversed the defendant's conviction. The en banc court explained that the defendant's conviction could not be sustained on the basis of an "intention to disrupt" as he "was not prosecuted on a theory of intention to disrupt presidential activity." *Patillo*, 438 F.2d at 16.

As Chief Judge Haynsworth observed in his dissent, the distinction between the test for willfulness adopted by the en banc majority (whether the maker of a threat might reasonably anticipate that it would be transmitted to law enforcement or security personnel) and that adopted by other circuits (whether the threat amounted to the declaration of an apparent determination to carry the threat into execution) may be only "a tempest of semantics," for both standards involve "an objective standard for measuring the defendant's intention." *Patillo*, 438 F.2d at 16 (Haynsworth, C.J., dissenting). Such semantic distinctions are not of sufficient moment to merit further review by this Court.

Moreover, in the 30 years since the decision in *Patillo*, every other court of appeals that has addressed the issue has adopted the objective standard for willfulness under Section 871. See p. 11, *supra*.[4] Although the Fourth Circuit has not had occasion since *Patillo* to reconsider its position, it may well do so when the opportunity arises, given the overwhelming weight of more recent contrary authority from the other circuits. This Court has denied several petitions for certiorari

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[4] Indeed, in the wake of the en banc decision in *Patillo*, the Fourth Circuit appears to have abandoned entirely the view that an intent to kill or harm the President is an essential element of a violation of Section 871. In its unpublished decision in *United States* v. *Weaver*, No. 96-4708, 1997 WL 787132 (Dec. 24, 1997), the court rejected the defendant's argument that the district court improperly denied his motion for a judgment of acquittal because of insufficient evidence of such an intent. The court observed that the statute is violated when a defendant intends, through threats, to restrict the Presidents's movements, an element that may be inferred by reference to "[w]hether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President." *Id.* at *1 (quoting *Patillo*, 438 F.2d at 16).

based on the claimed conflict with *Patillo*.[5] There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

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[5] See *Johnson* v. *United States*, 512 U.S. 1240 (1994); *Smith* v. *United States*, 502 U.S. 852 (1991); *Manning* v. *United States*, 501 U.S. 1234 (1991); *Herman* v. *United States*, 498 U.S. 944 (1990); *Callahan* v. *United States*, 464 U.S. 840 (1983).